

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION**

LARRY L. MCDUGALD

PLAINTIFF

VERSUS

CIVIL ACTION NO. 1:08CV450LG-RHW

**HARRISON COUNTY, MISSISSIPPI, BY AND
THROUGH ITS BOARD OF SUPERVISORS;
HARRISON COUNTY SHERIFF GEORGE PAYNE,
in his official and individual capacity;
CAPTAIN RICK GASTON, in his official and individual
capacity; DEPUTY BRODERICK FULTON, officially and
in his individual capacity, AND OTHER UNKNOWN
JOHN AND JANE DOES A-Z, also in their official
and individual capacities**

DEFENDANT

**DEFENDANT RICK GASTON'S MEMORANDUM IN SUPPORT OF HIS
MOTION TO DISMISS
PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 4(m)**

COMES NOW, RICK GASTON, by and through his undersigned counsel, and respectfully requests that this Court dismiss the above lawsuit without prejudice for failure to timely serve process under Rule 4(m) of the Federal Rules of Civil Procedure, and submits this memorandum in support of his motion, to wit:

1. On August 25, 2008, Plaintiff filed a complaint in the above styled cause, naming as a Defendant, Rick Gaston.
2. On December 19, 2008, Plaintiff filed a motion with this Court to extend the time in which to serve process on the Defendants in this cause, including Defendant Rick Gaston.
3. On December 23, 2008, this Court granted in part, and denied in part Plaintiff's motion. Plaintiff's was given an extension of time to serve

process on the Defendants, with a deadline set by this Court on February 24, 2009.

4. From the time the complaint was filed in this cause, there is no indication that Plaintiff has either requested to be issued, nor has there been issued, a summons by the clerk.

5. Rule 4(m) of the Federal Rules of Civil Procedure provides that:

(m) Time Limit for Service. If a defendant is not served within 120 days after the complaint is filed, the court – on motion or on its own after notice to plaintiff – must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period.

F.R.C.P. 4(m)

6. Plaintiff has failed to serve Defendant Rick Gaston within one hundred twenty (120) days, and has further failed to serve Defendant Rick Gaston within the time period which was granted to him by Order of this Court, and after Plaintiff made a request for the same.
7. Plaintiff can not show “good cause” as to why he has failed to serve Rick Gaston within one hundred and twenty (120) days of the initial filing of his complaint. Nor can Plaintiff show “good cause” because he has failed to serve Defendant Rick Gaston within the time frame set by this Court after Plaintiff’s request for additional time to serve process on the Defendant Rick Gaston. Further, Plaintiff can not show “good cause” because he has not attempted to have a summons issued by the Clerk, nor has he requested the Clerk to issue a summons.

WHEREFORE PREMISES CONSIDERED, your Defendant, RICK GASTON, respectfully requests this Court dismiss him from the above styled lawsuit without prejudice due to untimely service of process as required under Rule 4(m) of the Federal Rules of Civil Procedure.

RESPECTFULLY SUBMITTED, this the 25th day of February 2009.

/s/ Ian Brendel
IAN BRENDEL
Attorney for Defendant

CERTIFICATE OF SERVICE

I, IAN BRENDEL, do hereby certify that I have this day electronically filed a true and correct copy of the above and foregoing with the Clerk of Court using the ECF system, which sent notification of such filing to the following:

Michael W. Crosby, Esq.
2111 25th Ave.
Gulfport, MS 39501

This the 25th day of February 2009.

BY: /s/ Ian Brendel
IAN BRENDEL

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